

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint)	
Against Pat Davison and)	SUMMARY OF FACTS
David Mihalic, Republican)	AND
Candidates for Governor and)	STATEMENT OF FINDINGS
Lieutenant Governor)	

Louise R. Galt filed a complaint against Pat Davison and David Mihalic, Republican candidates for governor and lieutenant governor, on April 5, 2004. Mrs. Galt's complaint alleges that:

1. Mr. Mihalic does not meet the residency requirements to be eligible to serve as lieutenant governor under Article VI, Section 3 of the Montana Constitution; and
2. Because Mr. Mihalic does not satisfy the residency requirements of the Montana Constitution, Mr. Davison and Mr. Mihalic committed the offense of "false swearing" when they filed a "Declaration for Nomination" swearing that they possessed "the qualifications prescribed by the State of Montana for the offices ... [of governor and lieutenant governor]."

SUMMARY OF FACTS

1. Article VI, Section 3 of Montana's 1972 Constitution reads, in pertinent part, as follows:

"Section 3. Qualifications. (1) No person shall be eligible to the office of governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, or auditor unless he is 25 years of age or older at the time of his election. In addition, each shall be a citizen of the United States who has resided within the state two years next preceding his election."

2. Montana's 1889 Constitution (Article VII, Section 3) imposed virtually identical age and residency requirements on candidates for governor, lieutenant governor, and the other four elected executive branch officials.

3. Mr. Mihalic resided in Gardiner, Montana in the 1970's while working for the National Park Service ("NPS") in Yellowstone National Park. His NPS employment took Mr. Mihalic away from Montana after his stint in Yellowstone and the relevant facts relating to this complaint begin with Mr. Mihalic's return to Montana as the Superintendent of Glacier National Park in May of 1994.

4. Mr. Mihalic's family arrived in Glacier in July of 1994, and the Mihalic family initially lived in housing furnished by the United States government. Mr. Mihalic purchased a home in Columbia Falls, Montana in October of 1994 where he and his family resided during his tenure as Glacier's Superintendent.

5. In early 1999, Mr. Mihalic moved to Helena to become a member of Governor Marc Racicot's staff as part of a Federal work assignment program. Mr. Mihalic rented a condominium while he worked in the Governor's office in Helena. He returned to Columbia Falls in May of 1999.

6. Mr. Mihalic had intended that Glacier would be his final tour of duty before retirement from the NPS (he was three years away from retirement from the NPS in 1999). That changed when Secretary of the Interior Bruce Babbitt asked Mr. Mihalic to take the post of Superintendent at Yosemite National Park in September of 1999. Secretary Babbitt introduced Mr. Mihalic as the new Superintendent of Yosemite in October of 1999.

7. Mr. Mihalic was registered to vote and voted in Montana from 1994 through 1999.

8. Mr. Mihalic had a Montana driver's license from 1994 through the period he served as Glacier's Superintendent.

9. In 2000 Mr. Mihalic moved his family to Yosemite. Mr. Mihalic and his family lived in U.S. government housing during his entire tenure as Yosemite's Superintendent. Mr. Mihalic did not buy a house in California because it was not his intention to make California his residence. Mr. Mihalic believed he and his family were residents of Montana during their stay in Yosemite, and Mr. Mihalic had every intention of returning to Montana upon his retirement from the NPS.

10. While Mr. Mihalic was Superintendent of Yosemite, the Mihalics returned to Montana for several weeks every year in 2000, 2001 and 2002. Mr. Mihalic has a sister who lives in Kalispell, and the family visited her each year.

11. Mr. Mihalic licensed his car in California while serving as Yosemite's Superintendent. Mr. Mihalic is an avid fisherman, but he did not purchase either a Montana resident or non-resident fishing license when he came to Montana in 2000, 2001, and 2002. As a former law enforcement officer during his NPS employment, Mr. Mihalic did not want to create problems for himself or his family by purchasing a Montana resident fishing license and then have to explain why he had California license plates on his vehicle. To avoid problems, Mr. Mihalic and his family purchased Glacier or Yellowstone National Park fishing licenses and limited their fishing to areas within the boundaries of the Parks during 2000, 2001, and 2002.

12. Mr. Mihalic obtained a California driver's license while serving as Yosemite's Superintendent.

13. Mr. Mihalic voted in the November 5, 2002, California general election.

14. Mr. Mihalic filed a "California Resident Income Tax Return" in calendar year 2002. Mr. Mihalic's 2002 California tax return, which was filed after he returned to Montana, listed his Missoula, Montana address.

15. Mr. Mihalic and his wife filed Montana income tax returns for calendar years 1999 and 2000 but not in either 2001 or 2002. Mr. Mihalic's Montana tax returns indicated he was a "Resident Full Year" in 1999 and a "Resident Part Year" in 2000.

16. Mr. Mihalic kept his home in Columbia Falls, Montana, until January of 2001. Economic circumstances forced the Mihalics to sell their Columbia Falls home; however, Mr. Mihalic and his wife returned to Montana in July of 2001 to look for a home because they intended to return to Montana as soon as Mr. Mihalic's work in Yosemite was finished. Mr. and Mrs. Mihalic toured houses in Kalispell and Missoula in July of 2001 but did not purchase a home in Montana that year.

17. Mr. and Mrs. Mihalic returned to Missoula, Montana in May and in July of 2002 to look at houses. The Mihalics negotiated the purchase of their current home in Missoula in August and early September of 2002 and purchased it on September 17, 2002. Utility bills for the Mihalics' current home were placed in Mr. Mihalic's name in late September of 2002. At the request of the sellers, the Mihalics let the previous owners of their current home in Missoula stay in the house until October 2002. The Mihalics began moving personal items into their current Missoula home in early November of 2002.

18. While looking for a home in Missoula in September of 2002, Mr. Mihalic "pre-screened" private Missoula schools in anticipation of moving his children to Missoula. He advised the principal of the Catholic schools for Montana that he intended to move to Missoula and that two spots in the Missoula St. Joseph private school should be reserved for his two children. Mr. Mihalic's children enrolled in St. Joseph in January of 2003.

19. The NPS issued a press release on October 4, 2002, announcing Mr. Mihalic's retirement. The press release noted that Mr. Mihalic would "retire Jan. 3, 2003, and move to Missoula."

20. Mr. Mihalic's last day on the job at Yosemite was January 3, 2003, and he immediately moved to the home he and his wife had purchased in Missoula.

21. Mr. Mihalic applied for a Montana driver's license on January 17, 2003.

22. Mr. Mihalic registered to vote in Missoula County on January 17, 2003.

23. Mr. and Mrs. Mihalic maintained and used a checking account with Glacier Bank in Kalispell during the entire period Mr. Mihalic served as Yosemite's Superintendent (October of 1999 through January 3, 2003). Mr. Mihalic has continuously maintained and used a Glacier Bank checking account in Montana since May of 1994.

24. Mr. and Mrs. Mihalic maintained and used a D.A. Davidson financial account in Kalispell during the entire period that Mr. Mihalic served as Yosemite's Superintendent. Mr. Mihalic has continuously maintained and used a D.A. Davidson account in Montana since October 23, 1995.

25. Mr. Mihalic did not know or meet Pat Davison until he was approached about being a possible running mate with Mr. Davison. Mr. Mihalic first heard Pat Davison's name in early February of 2004 when he and a friend were discussing the Republican candidates for governor. The friend indicated he had just returned from a Republican function, and he had decided to support Pat Davison for Governor.

26. The Davison campaign asked Mr. Mihalic to submit a resume and biographical information as part of the Davison campaign's lieutenant governor selection process. The attorney for the Davison campaign, Mr. Mark Parker of Billings, Montana, discussed the Mihalic residency issue and the implications of Article VI, Section 3 with the Davison campaign in March of 2004. Mr. Parker also personally interviewed Mr. Mihalic. Mr. Parker advised the Davison campaign that if the residency issue was raised "the Supreme Court will, no doubt, have to decide whether under the facts of this case Mihalic resided in Montana for two years next preceding" his election. Mr. Parker further advised the Davison campaign that, although he could not predict the outcome of any litigation on the residency issue, he believed the Montana Supreme Court would "quickly conclude that Mihalic is a resident of Montana" based on the facts surrounding Mr. Mihalic's Missoula home purchase and his intention to make Montana his home.

27. Mr. Davison and Mr. Mihalic filed a "Declaration For Nomination" with the Montana Secretary of State's office on March 25, 2004. In the Declaration, Mr. Davison and Mr. Mihalic affirmed that they possessed "the qualifications prescribed by the constitution and laws of the State of Montana for the offices ... [of governor and lieutenant governor]."

STATEMENT OF FINDINGS

A. Introduction

Mrs. Galt's complaint requires that the residency issue be addressed in this decision. Mrs. Galt alleges that Mr. Davison and Mr. Mihalic have committed a deceptive election practice as defined in Sections 13-35-207(4) and (10), MCA, by making a false declaration of nomination and "a false oath or affidavit ... required by law." It is necessary, therefore, to make two determinations in this matter:

First, whether applicable Montana residency laws make Mr. Mihalic ineligible to be lieutenant governor; and

Second, whether Mr. Davison and Mr. Mihalic committed the misdemeanor offense of false swearing when they both swore or affirmed that they possessed "the qualifications prescribed by the State of Montana for the offices ... [of governor and lieutenant governor]."

B. The Residency Issue

Montana's 1972 Constitution incorporated almost verbatim the 1889 Constitutional requirement that candidates for governor and lieutenant governor are only "eligible to the office" if they have "resided within the state two years next preceding his election." See Article VI, Section 3(1) of Montana's 1972 Constitution and Article VII, Section 3 of the 1889 Constitution. There are no reported cases interpreting this state constitutional requirement even though the two-year residency mandate has been in existence for 115 years. The 1972 Constitutional Convention debate transcripts indicate that the two-year residency issue was only discussed indirectly during a debate about an amendment (which was defeated) that would have required Montana's

Attorney General to have at least five years of active law experience. See 1972 Montana Constitutional Convention, Verbatim Transcript, Vol. IV, pp. 893-896. In the absence of case law or illuminating 1972 Constitutional Convention debate, the complaint against Mr. Davison and Mr. Mihalic must be resolved based on a review of applicable residency statutes.¹

Mrs. Galt's complaint alleges that because Montana's 2004 general election will be held on November 2, 2004, Mr. Mihalic must have been a Montana resident as of November 2, 2002. I concur in Mrs. Galt's interpretation of Article VI, Section 3 because it reflects the plain meaning of this constitutional provision. The Davison campaign also appears to concur in this interpretation of Article VI, Section 3 because that is the interpretation given in the legal opinion prepared for Pat Davison as discussed in Fact 26.

Mrs. Galt next alleges that the residency requirements of Section 13-1-112, MCA, apply to Mr. Mihalic and that, because he voted in the 2002 California general election, Mr. Mihalic cannot claim residency in Montana for 2002 under 13-1-112(4), MCA. Section 13-1-112, MCA, establishes residency rules for "registration, voting or seeking election to the legislature." The express provisions of 13-1-112, MCA, do not

¹ Montana has numerous constitutional and statutory provisions establishing an array of residency requirements. For example, Article VII, Section 9 of the Montana Constitution requires Supreme Court and District Court Judges to have "resided in the state two years immediately before taking office" and to have been admitted "to the practice of law in Montana for at least five years prior to the date of appointment or election." A Montana legislative candidate must "be a resident of the state for at least one year next preceding the general election" (Article V, Section 4, Montana Constitution). Residency statutes enacted by the Montana Legislature address such disparate issues as the purchase a Montana fishing or hunting license (87-2-102, MCA), bid preferences on public contracts to Montana residents (18-1-103, MCA), the registration of motor vehicles (61-3-712(4), MCA), paying Montana income taxes on income earned outside Montana (15-30-101(28) and 15-30-132, MCA), acquiring a Montana driver's license (61-5-103, MCA) and defining when a student attending college in Montana becomes a resident eligible for lower tuition payments (20-25-501, MCA).

apply to individuals seeking election to the offices of governor, lieutenant governor or any other elective office except for legislative candidates. Under Montana's rules of statutory construction, I am prohibited from inserting what has been omitted. Section 1-2-101, MCA. If the Montana Legislature had intended that Section 13-1-112, MCA, apply to candidates for all elective office, not just legislative candidates, such language could have been easily inserted. Instead, the Legislature limited the applicability of 13-1-112, MCA, to three categories of activities -- voter registration, voting and candidates seeking election to the Montana Legislature.

It also must be noted that the substantive provisions of Section 13-1-112(4), MCA, may create serious constitutional questions. Subsection (4) of 13-1-112, MCA, states that an individual does not lose his Montana residence if he goes to another state for temporary purposes with the intention of returning to Montana "unless the individual exercises the election franchise in another state or district." This unequivocal declaration that Montana residency can be lost by exercising the right to vote in another state or district includes no time constraints (what if the vote in another state or district occurred five or ten years ago) and does not recognize that the election franchise can be exercised on a host of issues, including issues relevant to real property ownership by an individual in another state or district (what if the vote involved a sewer or water district in which the individual owns recreational property). The Montana cases deciding residency issues have historically considered all relevant facts relating to the residency dispute and it is unlikely that a vote cast in another state or district would be the sole basis for finding that residency within Montana or a legislative district had been forfeited. See, e.g., *Lima School District No. 12 v. Simonsen*, 210 Mont. 100, 109 & 110, 683 P.

2d 471 (1984); *Drummond v. Town of Virginia City*, 253 Mont. 428, 432 & 433, 833 P. 2d 1067 (1992); *State v. Britton*, 2001 MT 141, 306 Mont. 24, 25, 30 P.3d 337 (2001); and *Bush v. Park County*, Sixth Judicial District, Park County, Cause No. DV 02-180, April 15, 2004 Order.

In the absence of a specific legislative enactment defining the two-year residency language in Article VI, Section 3, the general rules for determining residency in Section 1-1-215, MCA, must be applied to Mr. Mihalic and the complaint filed by Mrs. Galt. The pertinent provisions of 1-1-215, MCA, read as follows:

"1-1-215. Residence -- rules for determining. Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

(1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

...

(6) The residence can be changed only by the union of act and intent."

One Montana case applying and interpreting Section 1-1-215, MCA, indicates that the criteria "are only guidelines for interpretation and not a definition" and that residency must be determined on the facts of each case. See *Lima School District*, supra, at p. 110. Other Montana cases clearly rely on the criteria in Section 1-1-215, MCA, to determine residency even when other statutory definitions of the term are directly applicable. See, e.g., *Pletcher v. Montana Department of Revenue*, 280 Mont. 419, 930 P. 2d 656 (1996). These cases substantiate that Section 1-1-215, MCA, provides the statutory framework for analyzing the facts in this matter and for

determining whether Mr. Mihalic satisfies the two-year residency requirement of Montana's constitution.

Mr. Mihalic and the Davison campaign assert that Mihalic satisfies the Montana constitutional residency requirements of Article VI, Section 3 applying the criteria in Section 1-1-215, MCA, because:

1. Mr. Mihalic has been a resident of Montana since 1994 based on the criteria in 1-1-215, MCA; or, in the alternative,

2. Mr. Mihalic's Montana residency status was restored in September of 2002 even if Mr. Mihalic inadvertently gave up his Montana residency when he became Superintendent of Yosemite National Park from October of 1999 through January 3, 2003.

Mr. Mihalic and the Davison campaign contend that the following facts support the contention that Mihalic has been a resident of Montana since 1994 when he took the job as Glacier's Superintendent.

Mr. Mihalic states he and his family fell in love with Montana during the five plus years they spent in Glacier and Columbia Falls. If U.S. Secretary of Interior Bruce Babbitt had not asked Mihalic to become Superintendent of Yosemite in California, Mr. Mihalic would have finished his NPS career in Glacier and Montana. The Mihalics lived in government housing while at Yosemite and did not purchase a home in California because Mr. Mihalic did not intend to make California his residence. The Mihalics kept their home in Columbia Falls until economic circumstances forced them to sell the home in January of 2001. The Mihalics returned to Montana in the summer of 2001 and again in the summer and fall of 2002 to look for a new Montana home. The Mihalics

purchased a home in Missoula and made arrangements in September of 2002 for their children to attend a private Missoula school. The Mihalics vacationed in Montana every summer in 2000, 2001 and 2002. Mr. Mihalic has continuously maintained a checking account in Montana since 1994 and a financial account with D.A. Davidson in Kalispell since 1995. A NPS press release issued in October of 2002 announced Mr. Mihalic's retirement and indicated he would move to Missoula.

The preceding facts, according to Mr. Mihalic and the Davison campaign, confirm that Mr. Mihalic has been a resident of Montana since May of 1994. Montana is the place where Mr. Mihalic would have remained in late 1999 through January 3, 2003, if he had not been called elsewhere for labor or a special or temporary purpose (Section 1-1-215(1), MCA). Montana is also the place where Mr. Mihalic returned in "seasons of repose" while temporarily assigned to Yosemite in California (Id.). Mr. Mihalic never intended to give up his Montana residency and his intent is substantiated by Mr. Mihalic's decision not to purchase a home in California while serving at Yosemite. Mr. Mihalic lived in government housing while on special and temporary assignment at Yosemite (1-1-215(2) & (3), MCA). Mr. Mihalic immediately returned to Montana in January of 2003 upon his retirement from the NPS. There was never a union of act and intent necessary to forfeit Mr. Mihalic's Montana residency (1-1-215(6), MCA).

In the alternative, Mr. Mihalic and the Davison campaign assert that, even if Mihalic unwittingly lost his Montana residency by serving as Yosemite's Superintendent, his Montana resident status was restored by his purchase of a new Montana home in September of 2002. The October 4, 2002, NPS press release confirmed that Mr. Mihalic was moving to Missoula upon his retirement on January 3, 2003.

It would be easy to accept the arguments of Mr. Mihalic and the Davison campaign if there were not several key actions taken by Mr. Mihalic that can be interpreted as contradicting Mr. Mihalic's stated intention to maintain his Montana residency while serving as Yosemite's Superintendent. Specifically, the following acts by Mr. Mihalic must be addressed in this decision:

1. Mr. Mihalic obtained a California driver's license for the period that he served as Yosemite's Superintendent.

2. Mr. Mihalic licensed his vehicles in California during his tenure as Yosemite's Superintendent.

3. Mr. Mihalic voted in the November 5, 2002 California general election.

4. Mr. Mihalic filed a California "resident" income tax return for calendar year 2002 and did not file a Montana resident or part-year resident income tax return in 2001 or in 2002.

Do these acts, either individually or in combination, override Mr. Mihalic's express intention to maintain his Montana residency while employed as Yosemite's Superintendent?

All states, including Montana and California, have laws that require an individual to obtain a driver's license and register a vehicle within a specified number of days after the individual is residing or employed in another state, either temporarily or permanently. In Montana, for example, an individual "who has resided in Montana for more than 120 consecutive days is considered to be a resident for the purpose of being licensed to operate a motor vehicle and must be licensed under the laws of Montana before operating a motor vehicle." Section 61-5-103(1), MCA. Mr. Mihalic was asked to

assume a high profile public service position in California -- Superintendent of one of America's busiest and most scenic National Parks. Continuing to drive a car with Montana license plates and showing a Montana driver's license to California patrolmen or merchants while serving as Yosemite's chief administrative officer was not a viable option for Mr. Mihalic. Mr. Mihalic's decision to comply with California's laws requiring registration of vehicles and licensure as a California driver cannot be construed as a decision by Mr. Mihalic to abandon his claim to Montana residency status.

Mr. Mihalic's decision to vote in the November 5, 2002 California general election is of greater concern. He and his wife had purchased a house in Missoula on September 17, 2002. Mr. Mihalic and the Davison campaign presented no evidence that Mihalic attempted to register to vote in Missoula County in September or October of 2002 (Mr. Mihalic could have voted absentee if properly registered). Ordinarily, such inaction in the face of a Montana residency claim would adversely affect my opinion of the residency claim; however, the timing of the purchase of Mr. Mihalic's Missoula residence and consideration of applicable Montana voter registration laws are mitigating factors in considering whether Mr. Mihalic's decision to vote in the November 5, 2002, California general election contradict his intent to maintain Montana residency status.

Montana's 2002 general election, like California's, was held on November 5, 2002. Montana law requires that registrations to vote be closed "for 30 days before any election" (the registration period was closed on or about October 5 in 2002, some sixteen days after the Missoula house purchase was consummated). Section 13-2-301(1)(a), MCA. Even if Mr. Mihalic had tried to register to vote absentee in Montana after purchasing his Missoula residence on September 17, 2002, his registration most

likely could not have been approved by the local election administrator. Mr. Mihalic had not yet moved back to Montana in September or October of 2002 and the Missoula residence was his first Montana address since selling his Columbia Falls home in January of 2001. The Mihalics had agreed to let the sellers of their Missoula residence "hold over" and occupy the home through October of 2002. Montana's 2002 voter registration application statute required an applicant to provide "the elector's current street address" Section 13-2-208, MCA (see also Section 13-2-110, MCA, for additional voter registration requirements adopted by the 2003 Legislature). Mr. Mihalic could not have provided a current Missoula street address to the local election administrator in September or October of 2002 because he was not physically living at the Missoula residence, nor could he have claimed any of the applicable military service exemptions to justify being allowed to cast a Montana vote using a California address. Under these extenuating circumstances and absent some other significant act by Mr. Mihalic contradicting his intention to maintain Montana residency status, his vote in the 2002 California general election would not, standing alone, be grounds to conclude that Mr. Mihalic forfeited his claim to Montana residency in calendar year 2002.

Mr. Mihalic's decisions to file a 2002 California "resident" income tax return and not to file Montana resident or part-year resident income tax returns for 2001 and 2002 are the most troubling acts in this matter. Mr. Mihalic no doubt felt he was in a "catch 22" situation and subject to conflicting tax policies in Montana and California, but he had a choice of how to file California and Montana income tax returns in a way that would have supported his intent to maintain Montana residency status. Montana law expressly states that if "a resident obtains employment outside the state, income from

such employment is taxable in Montana." Section 15-30-132, MCA. See also *Pletcher*, supra. Montana law also provides that "there may be only one residence" and that when a person claims "a residence in Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception." Section 1-1-215(2), MCA.

Mr. Mihalic chose not to file Montana resident or part-year resident tax returns in Montana for calendar years 2001 and 2002. In one of those years (2001), Mr. Mihalic sold his Columbia Falls home, a Montana transaction with potential tax consequences. Mr. Mihalic did file a California resident income tax return for calendar year 2002. California allows taxpayers to file either a California "Resident" or "Nonresident or Part-Year Resident" return. Mr. Mihalic filed a California resident return for calendar year 2002. These tax filing choices are not consistent with Mr. Mihalic's stated intention to maintain Montana residency status while serving as Superintendent of Yosemite. To the extent that these acts constitute a "union of act and intent" (Section 1-1-215(6), MCA), they do not reflect Mr. Mihalic's intention to maintain Montana residency status in calendar years 2001 and 2002.

The failure to file a Montana resident or part-year resident tax return for 2002 in the spring of 2003 and the filing of a 2002 California resident tax return in 2003 also overrides the assertion that Mr. Mihalic's Montana residency was reestablished by the purchase of his Missoula residence in September of 2002. Mr. Mihalic's 2002 California state income tax filing in 2003 was made several months after Mr. Mihalic acquired his Missoula residence in September of 2002. Filing a California resident tax return for

calendar year 2002 is inconsistent with his intent to reestablish Montana residency as of September 2002.

Based on the preceding, there is substantial credible evidence to conclude that Mr. Mihalic was not a resident of Montana in calendar year 2002 and that he does not satisfy the two-year residency requirement of Article VI, Section 3.

In reaching this decision on Mr. Mihalic's Montana residency status in calendar year 2002, the record should clearly reflect that:

1. Montana court decisions on residency indicate that rulings rely heavily on facts that support an individual's expression of intent in the absence of verbal evidence to the contrary. See, e.g., *Lima School District*, *supra*, and *Bush v. Park County*, *supra*. Montana court decisions on residency do indeed examine the facts of each case and any person wishing to litigate the Mihalic residency issue should be advised that the applicable law and case decisions are not clear, precise or directly applicable to the facts in this matter.

2. Mr. Mihalic did not return to Montana in January of 2003 to run for lieutenant governor. Mr. Mihalic did not know Pat Davison when he returned to Montana in January of 2003 and he first met Mr. Davison more than a year later. There is no evidence to suggest that Mr. Mihalic's decision to return to Montana from Yosemite in January of 2003 was driven by anything other than his love for Montana.

3. Mr. Mihalic is not a "Johnny come lately" to Montana who has no knowledge of the state or the issues confronting government. Mr. Mihalic was unquestionably a Montana resident from at least May of 1994 through October of 1999 and again from early January of 2003 to the present. He served for several months on the staff of

former Governor Marc Racicot in the spring of 1999. Within this context, case law involving legal challenges to candidate residency requirements like those in Article VI, Section 3 of the Montana Constitution establishes that such requirements are imposed for two fundamental reasons:

A. To ensure that candidates are familiar with the needs, conditions and problems of the state and the various segments of the population while also giving the state's citizens an opportunity to gain by observation and personal contact some firsthand knowledge of the candidate; and

B. To prevent frivolous candidacies by individuals with little previous exposure to a state's problems and citizens. See, e.g., *Chimento v. Stark*, 353 F. Supp. 1211 (D.C. N.H.), affirmed 414 U.S. 802, 94 S. Ct. 125 (1973).

There is no evidence suggesting that Mr. Mihalic does not satisfy these constitutional objectives in light of his five years served as Glacier's Superintendent from May of 1994 through October of 1999, a brief stint on former Governor Racicot's staff in 1999, and his subsequent return to Montana in January of 2003.

4. Mr. Mihalic, Mr. Davison, and the Davison campaign cooperated fully in this investigation. All information requested concerning Mr. Mihalic's residency was timely and completely provided to my office.

Although I have determined that Mr. Mihalic does not meet the two-year residency requirements of Article VI, Section 3, Montana law does not grant the Commissioner of Political Practices authority to remove his name from the ballot. The Commissioner does have authority under Sections 13-37-126 and 13-37-127, MCA, to notify appropriate election officials that a candidate's name should not be printed on the

official ballot or that a certificate of nomination or election should be withheld for failing to comply with the campaign finance reporting requirements of Montana law (Title 13, Chapter 37, MCA); however, the Commissioner has not been granted similar authority to take action based on the residency issue involved in this matter.

C. The False Swearing Issue

Because Mr. Mihalic does not meet the two-year residency requirements of Article VI, Section 3, it must now be determined whether Mr. Davison and Mr. Mihalic committed the offense of "false swearing" when they filed a "Declaration for Nomination" affirming that they possessed "the qualifications prescribed by the State of Montana for the offices ... [of governor and lieutenant governor]." Sections 13-35-207(4) and (10), MCA. Section 45-7-202, MCA, defines "false swearing," in pertinent part, as follows:

"45-7-202. False Swearing. (1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true"

An individual convicted of false swearing shall be fined not more than \$500 or imprisoned in the county jail for not more than six months. Section 45-7-202(3), MCA.

Based on the facts of this matter, neither Mr. Davison nor Mr. Mihalic knowingly made a false statement in their March 25, 2004 Declaration for Nomination. Mr. Davison and Mr. Mihalic also did not make a sworn statement in their Declaration for Nomination that they believed to be untrue. In fact, Mr. Davison and Mr. Mihalic fervently believed that Mr. Mihalic met the residency requirements of Article VI, Section 3 of the Montana Constitution. Mr. Davison sought and received legal advice on the Mihalic residency issue, and he received an opinion from legal counsel confirming what

both men believed to be true -- that Mr. Mihalic satisfied the two-year residency requirement of Article VI, Section 3.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings:

1. Mr. David Mihalic has not resided within the State of Montana for two years next preceding the November 2, 2004 general election as required by Article VI, Section 3 of the Montana Constitution; and

2. Mr. Pat Davison and Mr. David Mihalic did not commit the offense of false swearing under Section 13-35-207, MCA, when they filed their Declaration for Nomination with the Montana Secretary of State's office on March 25, 2004.

Dated this 21st day of May, 2004.

Linda L. Vaughey
Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of May, 2004, the foregoing Decision of the Commissioner was served on the parties hereto, addressed to the parties as follows:

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